No. 82-5448

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

TIMOTHY WILLIAM UNDERWOOD,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT,
DIVISION TWO

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The California Court of Appeal, Fourth Appellate District, Division Two, received petitioner's direct appeal from the judgment of conviction, and, in an unpublished opinion filed February 5, 1982, (People v. Underwood, 4 Crim. 12479), found no merit to petitioner's contention and affirmed the judgment. (Appendix A.)

After the Court of Appeal's denial of appellant's petition for a rehearing on March 5, 1982, (Appendix B), the California Supreme Court denied petitioner's petition for hearing on April 21, 1982. (Appendix C.)

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257.

QUESTION PRESENTED

Whether the failure to instruct on a lesser included offense because California decisional law requires evidence be presented warranting such an instruction, raises a substantial federal question.

STATEMENT OF THE CASE

An information filed June 16, 1980, by the San Bernardino County District Attorney charged petitioner with

committing murder, Pen. Code, § 187), during which he used a firearm in violation of Penal Code section 12022.5. (CT 3.)

Petitioner was arraigned, pled not guilty to the charge, and denied the weapons allegation. (CT 4.)

Petitioner proceeded to jury trial during which his motion for an acquittal as to first degree murder was granted. (CT 33-34.) Following the trial court's refusal to instruct the jury in accordance with voluntary manslaughter (CT 35), the jury, on November 3, 1980, found petitioner guilty of second degree murder as charged in the information. The weapons allegation was found to be true. (CT 38-39, 44-45.)

Petitioner was sentenced to an indeterminate sentence in the state prison for the term prescribed by law.

(CT 39, 96.)

Petitioner's conviction was affirmed by the California Court of Appeal, Fourth Appellate District, Division Two, in an unpublisehd opinion filed February 5, 1982. (Appendix A.)

The California Supreme Court denied petitioner's request for a hearing on April 21, 1982. (Appendix C.)

STATEMENT OF FACTS

On November 9, 1976, San Bernardino County Sheriff Deputy Michael Stodelle discovered a body in a small canyon off a dirt road in the vicinity of Cajon Pass. The body was found in a shallow grave, and was covered with sheets around which nylon wrapping had been packed. It had been placed in a greenish colored pastic trash bag and buried. The label on the sheet read, "The House of Cleanliness," which was a

logo used by the Quality Linen Service. The body was taken to the Mark B. Shaw Mortuary in San Bernardino where an autopsy was performed. It was then tagged as "John Doe, 15-76" after the autopsy failed to reveal the identity of the body. (RT 442-453.)

Dr. Irving Root performed the autopsy. Cause of death was determined to be a gunshot wound to the base of the skull, entering just below the mastoid on the left side, which penetrated the spinal cord as it exited the brain at the base of the skull. A silver material appearing on a portion of the skull indicated the shot came from a very close firing range. Due to the degree of decomposition of the body, the time of death could only be approximated as several weeks to several months before the discovery of the body. The wound observed would be consistent

with coming from a .45 caliber weapon.

Daivd Watson first came to California in 1975 and took up residence with his sister Beverly Whittenberger in September of that year. Watson first met petitioner in October 1975 and the two became friends. They began renting a house together in June 1976. On September 1, 1976, Ms. Whittenberger saw her brother driving a blue Ford van which he had purchased while Ms. Whittenberger was on a trip to Indiana. Watson told his sister there was going to be a party on September 3, 1976. Ms. Whittenberger, who never made it to the party, never saw her brother again. (RT 560-566.)

Diana Langley lived with appellant from mid 1975 through mid 1976. She first broke up with appellant in June 1976, at which time she moved in with her father, and petitioner moved in with

David Watson. Diana then began dating Watson. Their relationship lasted about one-and-a-half to two months, at which time she began dating petitioner again. During this time, petitioner and Watson would play "head" games , trying to turn Diana against each other by saying things behind each other's backs. When Diana became tired of the games she left petitioner during the latter part of August 1976. At the time Diana left, Watson told her he would have planned to marry her later. That was the last time Diana saw Watson. (RT 673-682.)

Two or three weeks later, Diana saw petitioner driving Watson's blue van. Nobody had ever driven that van but Watson. (RT 678.) When Diana asked petitioner where Watson was, petitioner finally said, "Dave, went bye-bye." Petitioner also stated Watson would not be found for a long

time. In addition, petitioner said, "He [Watson] didn't know what hit him;" that he felt no pain. Petitioner also remarked something about a "crime of passion." Petitioner told Diana not to tell anyone she had seen him that day. (RT 682-685.)

Approximately two weeks later, petitioner called Diana from the Ventura County Jail. He asked Diana to go to the house petitioner had shared with Watson and move all the belongings to storage, while getting rid of Watson's personal effects. Diana was told to make it look like Watson had taken off somewhere. He also said to call Beverly Whittenberger and tell her petitioner was in jail, and that he did not know Watson's whereabouts. (RT 687-688.)

Diana never told anybody about petitioner's behavior because she still had feelings for him at the time and

because she was scared. She finally related the sequence of events to detectives in September 1979, after being informed she could be prosecuted as an accomplice. (RT 699-701.)

In September 1976, Danny Stark owned a 1966 Lincoln Continental. He traded the car for a blue 1965 Ford van. When he traded for the van, the man he purchased it from removed a duffel bag of clothing and cleaned out what appeared to be sandy dirt from within the van. About a day after the trade, Stark received a notice his car had been impounded in Ventura. Approximately a week later, Stark spoke with Ms. Whittenberger and said her brother must be in jail since the person he traded the car to was identified as her brother. (RT 627-634.)

On September 5, 1976, Detective Don Lanning of the Oxnard Police Department

arrested petitioner in that Ventura County town for the robbery of a local Sambo's Restaurant. Petitioner was driving a 1966 Lincoln Continental in which was found a shoulder holster for a weapon. A loaded .45 caliber Colt, government model automatic was found at the scene of the robbery. After being booked in the Ventura County Jail, petitioner placed a call to Colleen Williams, a name used by Diana Langley at the time to get into bars. (RT 603-617, 619-620, 676.)

Approximately seven to ten days after last seeing her brother on September 1, 1976, Ms. Whittenberger noticed a For Rent sign in the front of his house. The landlady told her the boys were moving out and that Diana had been by to get their things because they were already up north. Two days later, Ms. Whittenberger met with Diana and they went to Watson's former

bedroom. It was empty. Among Watson's possessions which were missing was a black briefcase in which Watson had kept a .45 caliber gun and a smaller weapon. In the garage was Watson's motorcycle and the sheets and parachute cord which Watson had used in his linen service. One of the snaps of the sheet had been opened. (RT 568-573.)

Ms. Whittenberger then went to a U & I auto parts store where she saw her brother's van. She spoke with the van's new owner, Danny Stark, who said he had bought a vehicle from a man identified as Wayne Espinoza, an alias used by Watson. (RT 561.) Stark then told Ms. Whittenberger he thought her brother was in jail because of the impound notice he had received. When she called the Ventura County Jail Ms. Whittenberger did not locate a Wayne Espinoza but later found petitioner who

had used the name Timothy Britton. Ms. Whittenberger did not see petitioner until he was released from jail. When she asked him where her brother was, petitioner replied, "The last time I saw him he was headed for Las Vegas" driving the van. Asked how Watson could be driving the van when petitioner had traded it to Stark, petitioner said Watson had owed him money and had given him the van in exchange. (RT 574-577.)

In 1979, Ms. Whittenberger went to the sheriff's department to report a missing person. There she talked with Detective Jim Bailey. As Ms. Whittenberger related the circumstances of her brother's disappearance, Detective Bill Arthur, one of the deputy's who had discovered the body, overheard the conversation and felt it may relate to relate to the body designated "John Doe 15-76." When a piece

of sheet in Ms. Whittenberger's possession matched that found on the body the investigation was renewed. (RT 578-580, 621-624.)

On October 1, 1980, the body of "John Doe, 15-76" was exhumed. On October 21, 1980, the skull and the jaw of the body was examined against the dental records of David Watson. The body was thereafter identified as being that of David Watson. (RT 456-457, 477-482.)

* * * * *

ARGUMENT

PETITIONER'S CONTENTION FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION SINCE CALIFORNIA DECISIONAL LAW REQUIRING MORE THAN TRIVIAL EVIDENCE BE PRESENTED BEFORE A LESSER INCLUDED OFFENSE INSTRUCTION IS WARRANTED DOES NOT RESULT IN ANY DUE PROCESS VIOLATION OR ANYTHING LESS THAN A FAIR TRIAL

Petitioner alleges the failure of the trial court to instruct on the lesser included offense of voluntary mansalughter resulted in a denial of due process and a fair trial. As will be demonstrated, California's judicially created policy requiring there be evidence of substance before an instruction is mandated is perfectly proper.

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While petitioner purports to present two reasons to this Court for granting his writ, there is, in essence, but one. That is so because, in affirming petitioner's conviction, the Court of Appeal specifically concluded there was insufficient evidence upon which to justify the giving of a lesser included offense instruction. Thus, the only question presented through the petition is whether California decisional law, as exemplified by the decision in People v. Flannel (1979) 25 Cal.3d 688, validly requires more than trivial evidence be presented before an

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instruction on a lesser included offense becomes required. Respondent submits the California procedure does not in the least impinge on any due process right and does not adversely affect the receipt of a fair trial. Accordingly, it is a question of fact for the California courts to resolve and, therefore, no substantial federal question has been presented which would warrant the consideration of this Court.

As the statement of facts, supra, reveals, the physical findings concerning the cause of death of the victim belie any contention that the crime committed was less than murder. The gun was placed so close to the victim's head that the muzzle almost touched its target. Moreover, the entrance of the bullets indicated the victim was either shot from behind or while he was asleep. Thereafter, of course, great pains were

taken to dispose of the body which was not discovered until it had become badly decomposed. While petitioner suggests the homicide was the culmination of a "lover's triangle," this root cause of the crime does not remove the obvious intent with which the killing was accomplished.

Of equal importance, and something petitioner ignores, is the fact at the time the trial court discussed instructions with counsel it concluded (1) that no instruction on first-degree murder would be given (RST 16, lns. 5-10)[1] and (2) that the jury "probably will not receive a verdict of manslaughter." (RST 16, lns. 23-25.) Thereafter, counsel did not pursue the question any further.

The case about which petitioner

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1. RST refers to the reporter's supplemental transcript on appeal of the proceedings held October 29 and 30, 1980.

really complains is People v. Flannel, supra, 25 Cal.3d at p. 668. While petitioner alleges the Flannel decision altered the barometer for determining when an instruction was warranted, such is not the case. Rather, the California Supreme Court chose to delineate the quantum of evidence necessary for instructing the jury on an issue of law, while being cognizant of the jury's role to determine the credibility of the witnesses presented. Thus, the trial court, as in every evidentiary consideration, was to determine whether there was evidence presented which was deserving of the jury's consideration. Accordingly, when the evidence is "minimal or insubstantial" no instruction should be given. When , however, any theory of the case is supported by substantial evidence and instruction on that theory is required. (Id., at pp. 668, 685.)

This state created policy for determining when an instruction is appropriate simply does not infringe on any of the constitutional rights attending to a jury trial. While instructional issues can present serious questions of constitutional dimensions (see for example Taylor v. Kentucky (1978) 436 U.S. 478,[56 L.Ed.2d 468, 98 S.Ct. 1930])

> "It must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendement." (Cupp v. Naughten (1973) 414 U.S. 141, 147 [38 L.Ed.2d 368, 373 94 S.Ct. 396.)

Thus, this Court in Cupp recognized,

> "A judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instrucion of the jury by the judge." (Cupp v. Naughten, supra, 414 U.S. at p. 147.)[2/]

Simply stated, this judicially declared rule of California procedure affects no constitutionally guaranteed right. As a result, petitioner's contention raises no substantial federal question. As this Court stated in

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2. Petitioner's reference to Keeble v. United States (1973) 412 U.S. 205, [36 L.Ed.2d 844, 93 S.Ct. 1993] is inappropriate since that case emanated from a federal prosecution under the Major Crimes Act of 1885 regarding the commission of crimes by Indians on a reservation. There was no review of a judicially created state criminal procedure.

Sugarman v. United States (1918) 249 U.S. 182, 184, [63 L.Ed. 550, 551],

> ". . . Mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this Court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character an properly raised below."

Petitioner has done nothing more than refer to his claim as involving the Federal Constitution. Under these circumstances, then, the request for a writ of certiorari should be denied.

* * * * *

CONCLUSION

For the foregoing reasons respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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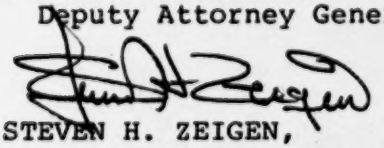
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General--Criminal Division

DANIEL J. KREMER,
Assistant Attorney General

A. WELLS PETERSEN,
Deputy Attorney General



STEVEN H. ZEIGEN,
Deputy Attorney General

Attorneys for Respondent

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11/29/82

[Filed February 5, 1982]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	4 CRIM. 12479
Plaintiff and Respondent,	(Sup. Ct. No. SCR 36995)
v.	
TIMOTHY WILLIAM UNDERWOOD,	O P I N I O N
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Don A Turner, Judge. Affirmed.

Dolan, Sanders & Mogin, John P. Dolan and Judith A. Sanders for Defendant and Appellant.

George Deukmejian, Attorney

General and Steven H. Zeigen, Deputy Attorney General, for Plaintiff and Respondent.

Defendant was convicted of second degree murder and the jury found true the allegation he used a firearm, within the meaning of Penal Code section 12022.5, during the commission of the offense. His only claim to error on appeal is that the trial court failed to instruct the jury on the lesser included offense of voluntary manslaughter. The court did not so instruct, because it found that the statute of limitations barred a prosecution for manslaughter and that there was insufficient evidence to support a charge of manslaughter. We affirm, because we agree that there is not enough evidence to require the giving of the requested jury instruction.

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FACTS

On November 9, 1976, an unidentified body, wrapped in lines which were tied with nylon strapping, was discovered inside a large plastic trash bag buried in a shallow grave near Cajon Pass in San Bernardino County. An autopsy failed to reveal the victim's identity. The body was tagged John Doe No. 15-76 (hereafter John Doe.)

The pathologist who performed the autopsy on John Doe formed the opinion that death was caused by a gunshot wound to the base of the skull and had occurred from two weeks to four months prior to the discovery of the body.

In mid-1975 Diane Langley began living with defendant. When she left defendant in June 1976, she moved in with her father. Defendant moved in with the victim, John David Watson, Jr. Diane

dated Watson for one and one-half months, and then dated both men for a short period of time.

During the latter period of time, defendant and Watson began to say negative things about each other to Diane. At one point the two men were not speaking to one another. Diane stopped seeing both men during the latter part of August 1976 because she did not like the rivalry that had developed between the two men. She never saw David Watson again.

Several weeks later, Diane observed defendant driving Watson's blue van. When she asked defendant what had become of Watson, defendant replied Watson had gone "bye-bye," he would not be found for a long time, he did not know what hit him, he did not feel any pain, and "It was a crime of passion."

In July 1979, Beverly Ann

Whittenberg went to the San Bernardino County Sheriff's Department to report her brother John David Watson, Jr. missing. She spoke with Detectives Bill Arthur and James Bailey. During the ensuing investigation, John Doe was exhumed and identified as John David Watson, Jr.

Defendant was charged with Watson's murder (Pen. Code, § 187) in an information filed on June 16, 1980. He was convicted of second degree murder and the jury found true the allegation he used a firearm within the meaning of Penal Code section 12022.5 during the commission of the offense. He appeals from this judgment.

DISCUSSION

A court has the duty to instruct the jury on every material question upon which there is any evidence deserving of any consideration whatever. Such evidence

however, must be substantial. There is no obligation to instruct on a particular theory of the case if the evidence supporting that theory is minimal and insubstantial. (People v. Flannel (1979) 25 Cal.3d 668, 684-685.)

Defendant sought to have the jury instructed on the crime of manslaughter. The trial court refused to give manslaughter instructions, because, inter alia, there was no substantial evidence to support that theory of the case. We agree.[1/]

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The difference between murder and manslaughter is that murder is the unlawful killing of a human being with malice aforethought (Pen. Code, § 187) while manslaughter is the same killing done without malice (Pen. Code, § 192.) Therefore, it is voluntary manslaughter, but not murder, when the killing is done either upon a sudden quarrel or heat of passion. (Id.)

1/ Because we affirm on the lack of substantial evidence grounds, we need not decide the propriety of the trial court's alternate ruling that manslaughter instructions were improper since a conviction for manslaughter was barred by the statute of limitations.

It is uncertain whether a defendant is entitled to an instruction on a lesser included offense that is time-barred. One case held that there is no such right (People v. Vallerga (1977) 67 Cal.App.3d 847, 882-883), while another case indicated that the right did exist (People v. Morgan (1977) 75 Cal.App.3d 32, 37, fn. 1; see also Keeble v. United States (1973) 412 U.S. 205 [36L.Ed.2d 844, 93 S.Ct. 1993]; Padie v. State (Alaska 1976) 557 P.2d 1138.)

In the present case, there is no substantial evidence that the killing was done upon a sudden quarrel or heat of passion. The only evidence that remotely supports such a theory is that defendant, the victim, and Diane Langley had in the past been involved in a "love triangle" and that defendant told Diane that it was a crime of passion. This is minimal evidence that the killing occurred because of their male rivalry and does not even assert a sudden quarrel or heat of passion. It tells the jury nothing about the events contemporaneous with the victim's death. To arrive at a manslaughter verdict, the jury would have had to engage in sheer speculation. The trial court was thus correct in not giving manslaughter instructions to the jury.

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The judgment of conviction is affirmed.

/s/ Morris
Acting P.J.

We concur:

/s/ McDaniel
J.

/s/ Gardner
J.*

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*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

[Filed March 5, 1982]

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. TIMOTHY WILLIAM UNDERWOOD, Appellant.	4 CRIM. 12479 San Brdno. County No. 36955

THE COURT:

The petition for rehearing is DENIED.

Morris, J.
Acting Presiding Justice

cc; County Clerk, San Brdno Co., 351 N. Arrowhead San Brdno, CA 92401
Atty. Gen. 110 W. A St. San Diego CA 92101
District Atty. of San Brdno Co.
Dolan & Sanders 1072 S.E. Bristol, Santa Ana, CA 92707

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

APR 21 1982

I have this day filed Order

81D70180
HEARING DENIED 4/14/82

In re: 4 Crim. *No.* 12479

People

vs.

Timothy W. Underwood

Respectfully,

Clerk

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian
Attorney General
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San Diego, California 92101

No. 82-5448

TIMOTHY WILLIAM UNDERWOOD,
Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA,
Respondent

I, CLIFFORD REED, being duly sworn, depose and say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served three copies of the BRIEF OF RESPONDENT IN OPPOSITION (ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION TWO) on the following, by placing same in envelopes addressed as follows:

John P. Dolan, Esq.
Judith A. Sanders, Esq.
1072 S.E. Bristol St.
Santa Ana, CA 92702

Dennis Kottmeier
District Attorney
316 N. Mt. View Ave.
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V. Dennis Wardle
County Clerk
Courthouse Addition
351 N. Arrowhead Ave.
San Bernardino, CA 92415
for del. to Hon. Don A Turner,
Judge

Keenan Casady, Clerk
Court of Appeal
Fourth Appellate District
Division Two
303 West Third St.
San Bernardino, CA 92401

Laurence P. Gill, Clerk
California Supreme Court
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California on December 6, 1982.

There is a delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed on December 6, 1982, at San Diego, California.

Clifford Reed
Clifford Reed

Subscribed and sworn to
this 6thday
of December, 1982.

Vida M Allen
NOTARY PUBLIC in and for the County
of San Diego, State of California

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986